No. 15,415

United States Court of Appeals

For the Ninth Circuit

CHENG LEE KING,
Appellant,

vs.

DAVID H. CARNAHAN, as Regional Commissioner of the Immigration and Naturalization Service,
Appellee.

BRIEF FOR APPELLANT.

FALLON AND HARGREAVES,
550 Montgomery Street,
San Francisco 11, California,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

Miscellaneous

No. 15,415

United States Court of Appeals
For the Ninth Circuit

CHENG LEE KING,

Appellant,

vs.

DAVID H. CARNAHAN, as Regional Commissioner of the Immigration and Naturalization Service,

Appellee.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

Jurisdiction is conferred upon the Court below by the Declaratory Judgment Act (28 U.S.C., Sec. 2201, 62 Stat. 964, as amended, 63 Stat. 105), which provides as follows:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Jurisdiction is also conferred upon the Court below by Section 10 of the Administrative Procedure Act (5 U.S.C., Sec. 1009, 60 Stat. 243), which provides in pertinent part, as follows:

> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion. (a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

Jurisdiction to review the judgment of the Court below is conferred upon this Court by 28 U.S.C., Sec. 1291.

The claim of right to adjustment of status, and denial of that right by the appellee are pleaded in the complaint (T. 4-15) and the amended complaint (T. 16-17).

STATEMENT OF THE CASE.

The appellant is a native and citizen of China and resided in that country from the time of his birth, in 1913, until 1924, when his father took him to Singapore, Malay States. Appellant resided in Singapore until 1939 at which time he obtained employment as a seaman.

During World War II, appellant worked on various ships of the Allied Forces sailing out of British ports to the Mediterranean area. The appellant sailed on Panamanian (American owned) and American

vessels out of United States ports from about September of 1945 until August 20, 1953, the date of his last entry into the United States. Subsequently, appellant has been employed ashore in the United States due to his inability to obtain employment as a seaman.

On December 21, 1953, appellant filed an application for adjustment of his status to that of an alien lawfully admitted for permanent residence on the ground that he would be subjected to physical persecution if deported to Communist China pursuant to Section 6 of the Refugee Relief Act of 1953, (50 U.S.C., Appendix Sec. 1971d, 67 Stat. 403, as amended 68 Stat. 1044).[1]

---

[1] "Any alien who establishes that prior to July 1, 1953, he lawfully entered the United States as a bona fide nonimmigrant and that he is unable to return to the country of his birth, or nationality, or last residence because of persecution or fear of persecution on account of race, religion, or political opinion, or who was brought to the United States from other American republics for internment, may, not later than June 30, 1955, apply to the Attorney General of the United States for an adjustment of his immigration status. If the Attorney General shall, upon consideration of all the facts and circumstances of the case, determine that such alien has been of good moral character for the preceding five years and that the alien was physically present in the United States on the date of the enactment of this Act and is otherwise qualified under all other provisions of the Immigration and Nationality Act except that the quota to which he is chargeable is oversubscribed, the Attorney General shall report to the Congress all the pertinent facts in the case. If, during the session of the Congress in which a case is reported or prior to the end of the session of the Congress next following the session in which a case is reported, the Congress passes a concurrent resolution stating in substance that it approves the granting of the status of an alien lawfully admitted for permanent residence to such alien, the Attorney General is authorized upon the payment of the required visa fee, which shall be deposited in the Treasury of the United States to the account of miscellaneous receipts, to record the alien's lawful admission for permanent residence as of the date of the passage of such concurrent resolution. If, within

Said application was denied by the Regional Commissioner of the Immigration and Naturalization Service, the appellee herein, acting as the designated delegate of the Attorney General pursuant to regulations. (8 C.F.R. 245a.11-1955 Supp.)

In the course of administrative proceedings and in the Court below, it was conceded that appellant's country of last foreign residence is Singapore. It was further conceded that appellant does not fear that he would be subjected to physical persecution by the governmental authorities of Singapore. His inability to return to Singapore is due solely to the fact that the British authorities have concluded that he is inadmissible and have, therefore, denied his application for a visa to enter Singapore as a permanent resident. Thus, the only country that appellant could enter or be deported to is Communist China. It is undisputed that appellant is unable to return to Communist China because of fear of persecution.

---

the above specified time, the Congress does not pass such a concurrent resolution, or, if either the Senate or the House of Representatives passes a resolution stating in substance that it does not approve the granting of the status of an alien lawfully admitted for permanent residence, the Attorney General shall thereupon deport such alien in the manner provided by law: *Provided,* That the provisions of this section shall not be applicable to any aliens admitted to the United States under the provisions of Public Law 584, Seventy-ninth Congress, second session (60 Stat. 754), Public Law 402, Eighteith Congress, second session (62 Stat. 6): *Provided Further,* That the number of aliens who shall be granted the status of aliens lawfully admitted for permanent residence pursuant to this section shall not exceed five thousand."

As originally worded, the Section limited relief to the alien who could establish that "persecution or fear of persecution" resulted from events which had occurred subsequent to his entry into the United States.

The sole issue presented to the Court below was whether the appellee had properly construed Section 6, supra, in denying appellant's application for adjustment of status. This issue was submitted to the trial Court on the pleadings, certified record of the Immigration and Naturalization Service, letter of September 4, 1956, from the office of the British Consulate General stating that appellant is inadmissible to Singapore, and briefs of both parties to the suit.

The Court below affirmed the decision of the Regional Commissioner on the ground that:

> ". . . the adjustment of status sought by plaintiff under Section 6 of the Refugee Relief Act of 1953 was properly denied in that plaintiff is not unable to return to the country of his last residence because of persecution or fear of persecution on account of race, religion or political opinion." (T. 24.)

The sole question involved is whether the Court below has erroneously construed Section 6 of the Refugee Relief Act of 1953, supra, in its decision denying appellant's request for a declaratory judgment.

SPECIFICATION OF ERRORS.

Appellant has specified the following point on which he intends to rely on this appeal:

> "1. The Trial Court erred in its construction of Section 6 of the Refugee Relief Act of 1953, 67 Stat. 336 (50 U.S.C. Appendix 1971d) by deciding that plaintiff is ineligible for adjustment

of status under that Act because his inability to return to Singapore, the country of his last residence, is based upon the impossibility of procuring the requisite documents to enter Singapore, rather than upon persecution or fear of persecution in that country'' (T. 28).

ARGUMENT.

1. REFUGEE RELIEF ACT OF 1953.

The Refugee Relief Act of 1953, supra, provides for the issuance of immigration visas to refugee aliens outside the United States who fit within certain categories defined by the Act. The matter of determining whether an application for a visa under the Act shall be granted to a refugee alien outside the United States is left entirely to administrative agencies of the federal government. On the other hand, refugee aliens within the United States who apply for adjustment of status under Section 6 of the Act need not fit within the categories set up under the other provisions of the Act. If they meet the requirements of that Section, the Regional Commissioner, acting as the designated representative of the Attorney General, must report to Congress all the pertinent facts in the case. Congress has reserved unto itself the function of determining whether the application shall be granted.

Cheng Fu Sheng v. Barber, 144 F. Supp. 913.

The Regional Commissioner of the Immigration and Naturalization Service determined that the appellant

fails to meet the requirements set forth in the following portion of Section 6 of the Refugee Relief Act of 1953:

> "Any alien who establishes . . . that he is unable to return to the country of his birth, *or* nationality, *or* last residence because of persecution or fear of persecution. . . ." (Emphasis supplied.)

In the vast majority of applications, the applicant's country of birth, nationality and last residence are identical and in such cases, the language of that portion of the statute quoted above presents no problem. A question of statutory construction arises only in those situations where more than one country is involved.

Ordinarily, the word "or" in a statute is to be construed as a disjunctive participle, providing an alternative, and corresponding to "either".

> *In re Rice,* 165 F. 2d 617, 619 (C.A.D.C.);
> *Gay Union Corporation v. Wallace,* 112 F. 2d 192, 196 (C.A.D.C.).

The appellant would clearly be eligible for adjustment if the above rule of construction were adopted as it would only be necessary to establish fear of persecution as to one of the three alternative countries. If the Act were so construed, however, the result would be to make a category of individuals eligible for adjustment whom Congress, in all probability, had no intention of benefiting. Said category is composed of those aliens who do not fear persecution in one of the three countries specified in Section 6 *and are*

able to return to that country. A case in point is, *Fong Sen v. U.S. Immigration and Nat. Service,* 137 F. Supp. 236, where the plaintiff's country of birth and nationality was China and country of last residence was Hong Kong. The Court in that case affirmed the Regional Commissioner's denial of the plaintiff's application under Section 6 on the ground that plaintiff *was able* to return to Hong Kong and that he would not be persecuted there.

Furthermore, Congress has, subsequent to the enactment of Section 6, clearly manifested its intention that the word "or" is not to be given its normal disjunctive meaning in that section. The opinion of the Court below refers to Senate Report 2045 on House Bill 8193 wherein the Senate Judiciary Committee expressed its intention that:

> ". . . if the applicant for adjustment is *able to return to any such country* without persecution or fear of persecution, he is not eligible for adjustment." (Emphasis supplied.)[2]

The Court below relies, in part, upon the above quoted language to justify the assumption that Congress intended the word "and" to be substituted for "or" whenever the applicant's country of birth, nationality and last residence are not one and the same. Appellant contends that substitution of "and" for "or" is warranted only if the applicant for adjustment fails to establish that he would be subjected to persecution upon return to one of the specified coun-

---

[2]U.S. Code Cong. and Adm. News, 83rd Congress, 2nd Session, Vol. 3, at page 3692.

tries, and also fails to show that he is unable, in fact, to return to that particular country. Where, however, an applicant establishes that he is unable to return to the country of his birth and nationality because of fear of persecution, and that he is unable to gain admission to the country of his last residence, the substitution of "and" for "or" cannot be justified by the plain meaning of Section 6 nor by the legislative history pertaining thereto.

---

2. LEGISLATIVE HISTORY OF THE REFUGEE RELIEF ACT OF 1953.

The legislative history of the Refugee Relief Act of 1953 evidences Congress' concern with the political, social and economic problems created by the fact that many thousands of persons were left homeless as a result of the emergence of new totalitarian states after World War II. The Act was designed, in part, to alleviate overpopulation pressures abroad and to thereby further the objectives of American foreign policy. Primarily, however, the Act had the humanitarian purpose of providing a permanent home to those unfortunate individuals who, either abroad or in the United States, have nowhere to turn but toward the Iron Curtain. Congress' desire to afford relief to the victims and potential victims of Communist oppression is expressed throughout the Report of the House Judiciary Committee on House Bill 6481.[3]

---

[3]House Report 974, U.S. Code Cong. and Adm. News, 83rd Congress, 1st Session, Vol. 2, page 2103 et seq.

Said Report also contains a letter addressed to the Honorable Joseph W. Martin, Jr., Speaker of the House of Representatives, from the President of the United States, expressing his solicitude for the plight of the refugee which states in part:

> ". . . these refugees and escapees searching desperately for freedom look to the free world for haven. . . . They look to traditional American humanitarian concern for the oppressed."[4]

To deny relief under Section 6 of the Act to appellant frustrates the very purpose of the legislation. Appellant has established that he would be subjected to physical persecution if he were forced to return to Communist China, the country of his birth and nationality. Yet, denial of his application would result in immediate steps being taken by the Immigration and Naturalization Service to effect appellant's deportation to Communist China. *Such a result was the very thing Congress intended to prevent by enactment of the Refugee Relief Act of 1953.* The fact that appellant's country of last residence is Singapore, Malay States, should have no bearing on his eligibility for adjustment once it is shown that he cannot return there. He has established that the only country that will admit him within its borders as a permanent resident is a totalitarian state where he will be persecuted. He is in fact a refugee and it is inconceivable that Congress desired to make a distinction between him and the individual whose country of birth, nationality

---

[4]U.S. Code Cong. and Adm. News, 83rd Congress, 1st Session, Vol. 2, at pages 2103, 2104.

and last residence is China. In either case Communist China is the only country to which admission can be gained. Such a distinction is unreasonable and cannot be supported by the history or the purpose of the legislation.

In *D'Antonio v. Shaughnessy,* 139 F. Supp. 719, the Court in discussing Section 6 of the Refugee Relief Act points out at footnote 2, page 721, that:

> "The amendment of August 31, 1954 was a liberalizing amendment in that it eliminated the qualification that the 'persecution or fear of persecution' must have resulted from events which had occured subsequent to the alien's entry into the United States."

The Court, in that case, was concerned with a different problem of statutory construction than we have here. Nevertheless, it is of interest to note that the Court considered Section 6 as a statute which was enacted for the purpose of preventing an alien from being deported to a country wherein he faces persecution. That section was compared with Section 243(h) of the Immigration and Nationality Act (8 U.S.C. 1253(h), 66 Stat. 212).[5]

The Court states at pages 722 and 723 as follows:

> "Furthermore, the very language used in the statute under consideration—Section 1971d, Section 6 of the Refugee Relief Act—provides internal evidence of a broader policy on the part of Congress

[5]"The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

in enacting that section, when that language is compared with the wording of a cognate statute such as Section 1253(h) of Title 8 U.S.C.A. *While both deal with the problem of a deportee facing deportation to a country wherein he may be persecuted* (emphasis supplied by writer) under section 1253(h) the immigrant must show fear of *'physical persecution'* (emphasis supplied by court) and even then the action on the part of the Attorney General in staying deportation is apparently at his discretion."

---

3. THE COURT BELOW ERRONEOUSLY CONSTRUED SECTION 6 OF THE ACT.

The decision of the Court below is based, in part, upon its interpretation of a portion of the Report of the Senate Judiciary Committee on House Bill 8193, which is set forth below:

> "The committee has restored the language 'birth, or nationality, or last residence', which is the language presently contained in Section 6 of the Refugee Relief Act of 1953. The committee understands that this language has been construed by the Immigration and Naturalization to mean that if the applicant for adjustment is able to return to any such country without persecution or fear of persecution, he is not eligible for adjustment. Since, the existing language, as construed, correctly expresses the intent of the section, no purpose would be served by modifying the language as proposed in the bill."[6]

---

[6]Senate Report 2045, U.S. Code, Cong. and Adm. News, 83rd Congress, 2nd Session, Vol. 3, pages 3691, 3692. A revision of the language, "Birth or nationality or last residence" had been proposed in House Bill 18193, 83rd Congress, 2nd Session.

On the basis of the above quotation, the Court below concluded that Congress intended that if the three countries referred to in Section 6 are different, it is then incumbent upon an applicant to establish fear of persecution in each country, notwithstanding the fact that he is unable to return to one of the countries due to inadmissibility. It is appellant's contention that the plain meaning of the above quoted language does not support the conclusion reached by the Court below. The key words of the quotation are, "is able to return". *That is, ability to return is a prerequisite to the duty of establishing fear of persecution as to any particular country.*

To require proof of persecution in one of the specified countries when an applicant cannot, in fact, return thereto, is to place an undue burden upon the applicant which was not intended by Congress. How can an applicant possibly know whether he would be persecuted in a particular country when he cannot return to that country. His return can only be considered as a hypothetical proposition, so if he attempted to prove persecution he would be forced to engage in rife speculation.

In the Court below, appellant urged that the Refugee Relief Act is remedial legislation and as such should be liberally construed. Although the Court conceded that the Refugee Relief Act may be characterized as remedial legislation, appellant's contention that the Act should be liberally construed was rejected. The Court held that such construction would increase the number of eligible applicants, and thus,

add to the burden of Congress in selecting those applicants to be granted permanent residence. Nothing is contained in the Act itself nor in its legislative history which would suggest that Congress was concerned with being overburdened by the number of cases presented. Section 6 explicitly provides for the adjustment of status of up to 5,000 aliens within the United States. The deadline for filing applications under Section 6 was June 30, 1955. Yet, only 4,808 applications had been submitted to Congress pursuant to Section 6 as of January 2, 1957, according to information furnished to counsel for the appellant in the form of a letter from Walter M. Besterman, Legislative Assistant to the House Committee on the Judiciary.[7] It would, therefore, appear that Congress

---

[7]The letter referred to above has been filed with the Clerk of this Court and is reprinted in full, as follows:

"House of Representatives, U.S.
Committee on the Judiciary
Washington, D.C.

January 2, 1957

Robert S. Bixby, Esquire
Fallon and Hargreaves
550 Montgomery Street
San Francisco 11, California

Dear Mr. Bixby:

In reply to your letter of December 17, please be advised that 4,808 applications have been submitted to Congress pursuant to the provisions of Section 6 of the Refugee Relief Act of 1953, as amended. Of those cases, 1,714 are presently under consideration, 330 were disapproved, and 24 were withdrawn from the Congress by the Attorney General. The remainder of those cases were approved and included in concurrent resolutions.

Sincerely yours,
/s/ W. Besterman
Walter M. Besterman
Legislative Assistant"

has not been overburdened and has, in fact, received less applications than anticipated.

In any event, the appellant's situation is highly unusual and very few additional applicants are in a similar position. To grant relief to the appellant would certainly not materially increase the burden on Congress.

Those Courts, other than the Court below, that have had occasion to consider the proper construction of Section 6 of the Act have decided that it should be liberally construed.

In *D'Antonio v. Shaughnessy*, 139 F. Supp. 719, the Court said at page 723:

> "Thus, the statute applicable to the instant case (Section 6 of the the Refugee Relief Act of 1953) apparently reflects a liberal and remedial purpose on the part of Congress; and it should be construed to effectuate that purpose."

The above case was cited with approval in this District by Judge Murphy in *Sun v. Barber,* 114 F. Supp. 850, wherein the Court was also presented with a question of the proper construction of Section 6 of the Refugee Relief Act. In the recent case of *Foo v. Brownell,* (U.S.D.C., Dist. Col., 2/8/57) not yet reported, Judge Holtzoff liberally interpreted the provisions of Section 6 in accordance with *Sun v. Barber,* supra.

CONCLUSION.

It is submitted that the Court below erroneously construed Section 6 of the Refugee Relief Act of 1953, and that the judgment should be reversed.

Dated, San Francisco, California,
March 17, 1957.

FALLON AND HARGREAVES,
Attorneys for Appellant.